



Docket No. APHIS-2017-0062

Regulatory Analysis and development

PPD, APHIS, Station 3A-03.8

4700 River Road, Unit 118

Riverdale, MD 20737-1238

## **Introduction**

I am writing on behalf of the National Animal Interest Alliance (NAIA), a broad-based animal welfare national organization. NAIA was founded in 1991 to help the public and lawmakers understand complex, emotional, and often controversial issues regarding animals. We work to advance the welfare of animals, preserve the human-animal bond and safeguard the rights of responsible animal owners using a fact-based approach. Our membership is diverse and bipartisan and includes pet owners, hobby dog breeders, rescuers, sportsmen, pet businesses, conservationists, scientists, and veterinarians in every state of the US.

We appreciate the hard work and detailed analysis that APHIS undertook in reviewing the current regulations and proposing revisions to improve the welfare of animals and the efficiency and effectiveness of governmental enforcement of the Animal Welfare Act. We are, in general, supportive of the changes proposed by the agency and will provide our reasoning for this support. In those few instances where we believe that the proposed solutions do not achieve the desired outcome without unintended consequences, we will propose alternatives.

**Comments Supporting Proposed Changes to License Terms, Requirements for License Issuance, Addition of Temporary Licenses in Certain Circumstances, and Changes to Fees, Definitions and Conforming Requirements to Include Electronic Publication and Better Reflection of the Act.**

**License Terms**

The current regulations provided a challenge for APHIS by making it difficult and time-consuming to terminate licenses of those who are unable to maintain the required standards of care as demonstrated by unscheduled inspections. The current regulations do not require a recertification to renew a license, requiring prolonged administrative adjudication before a fine can be imposed or a license terminated for noncompliance with the regulations. The proposed change of having fixed-term licenses will make it easier to take appropriate action against those who do not meet the standards of care, while maintaining the rights of licensees.

To improve what we believe is the intent of APHIS in these revisions and for consistency of requirements, we suggest editing paragraph 2.5(a)(1) as follows: “The license has been revoked or suspended pursuant to section 19 of the Act or these Regulations.”

### **Requirements based on changes to species or numbers of animals**

Although the current regulations set different care standards for various species, they do not require a current licensee that adds a different species or increases the number of animal within a species by a significant amount to demonstrate that they can comply with the regulations for that species or adequately care for the increased number of animals. Both these shortcomings are addressed in the proposed regulatory changes by requiring new license applications to ensure that adequate care can be maintained. Licensees can avoid the need to reapply when adding species or increasing numbers by including the widest range of option in their license application since no fees are based on those factors.

Other significant positive changes tighten the requirements for obtaining a license or working for a licensee to ensure the license holders and their employees are properly vetted and are actually engaging in the regulated activity. We do have one concern in this regard. We support the inclusion of pleas or conviction of animal cruelty, or the transportation, ownership, neglect or welfare of animals. However, local cruelty laws vary widely from one jurisdiction to another, and some of the offences incorporated (e.g., failure to license an animal or some tethering violations) do not bear directly on animal welfare. Therefore, we suggest that the proposed language be amended either to include those activities like those covered under the Act or that it be made clearer elsewhere

### **Redefinition of Business Hours**

Another seemingly minor change with significant positive implications for APHIS and the regulated community is the revised definition of business hours. It currently requires a reasonable number of hours during which unannounced inspection may occur be held between 7 a.m. and 7 p.m. every weekday except for legal Federal holidays. Even part-time employment or an hour-long trip for shopping could result in noncompliance with the requirement for presence for an unscheduled inspection. Some licensees have weekend hours to accommodate the public who also work and may not be available to view their animals within the current definition. The inability to conduct an inspection due to unavailability is classified as a “Critical” noncompliant item (NCI) which may have serious implications for the licensee or registrant. APHIS’ decision to conduct unannounced inspections within a timeframe suitable to the operation of the licensee should reduce the number of failures to inspect based on an attempted inspection, increase compliance and use the resources of APHIS more efficiently.

## **Changes to Dog Import Regulations**

Finally, without addressing other issues regarding the importation of dogs, we appreciate APHIS conforming the regulations better to reflect the language of the statute with respect to several definitions and to clarify the regulations to reflect the extent of its authority under the Act.

## **Public Perception**

These changes also address a significant issue that created the negative perception of APHIS' enforcement activities by some in the public. By implementing these changes, APHIS will gain tools to address systemic impediments to successful oversight of those requiring licenses or registration and be able to enforce the AWA standards better with respect to those who are unable to comply with its requirements. These changes may not only accrue to the public perception of APHIS, but also to the public developing a more favorable attitude to those regulated under the AWA as they see improved oversight of their operations.

## **Comments on Issues Needing Further Improvement**

### **License Termination**

Our first concern involves the lack of other than conforming changes to section 2.12 and current section 2.1(c), now designated as proposed subsection (d). We believe that the proposed changes to the other parts of the regulations, coupled with APHIS' categorization of noncompliance requires that these sections be modified. In order to obtain a three-year license, section 2.11 requires, in paragraph (a)(2), that the applicant demonstrate they are in compliance with the Act and the regulations and standards issued under its authority. Proposed sections 2.1 (d) and 2.12 permit APHIS to terminate a license, after a hearing, for any reason for which a license application may be denied under section 2.11. We support this wording for license applications, but not license terminations. The only areas with which we find disagreement are with respect to the requirements of sections 2.1(d) and 2.12 in reference to section 2.11(a)(2).

In its inspection manual, APHIS defines several types of noncompliant items (NCIs) which may be cited in an inspection report. The more serious NCIs are Critical, Direct and Veterinary Care Direct, which have some overlap depending on the circumstances. All have significant implications for the potential or actual welfare of the animals in the facility. Another type of NCI is a Teachable Moment, defined as a minor NCI that does not directly affect animal welfare, is not likely soon to become one of the more serious NCIs, is not a Direct or Critical NCI, is one which the facility is able and willing to correct quickly, and was not previously listed as a Teachable Moment or cited at the facility.

As currently and proposed, an NCI reported as a teachable moment could result in a license termination. Although there are judicial safeguards in the process, authorizing APHIS to terminate a license under those circumstances would be a gross miscarriage of justice. A better approach would be to amend sections 2.1(d) and 2.12 to specifically exempt minor NCIs as the basis of a license revocation unless they are repeated. This could be done by reference to the APHIS Inspection Manual or by designating as exempt from revocation decisions those NCIs that were deemed to be *de minimis* NCIs.

## **Water Availability and Hydration**

The first concern is especially relevant to our second, which involves the change in the requirement for access to water for dogs. APHIS proposes to change the standard for dogs from the current access to water twice a day for one hour to continual access to water. This would result in APHIS being able to terminate a license for a single NCI, despite the dog being adequately hydrated. As APHIS, itself, notes, the “lack of continual access to water is generally not a risk to healthy dogs” and says that specific exacerbating factors (e.g., stress, age, health, temperature, etc.) may lead to a greater need to access water. There are no data or veterinary care requirements described to support this change for healthy dogs. Some active and healthy animals play with water bowls and spill water. The lack of continuous access to water in those cases should not be an NCI if the dog is adequately hydrated. The health and welfare of animals is directly related to their degree of hydration, not to the frequency or duration of access to water. The requirement for continuous access to water for all approaches an arbitrary or capricious regulation based on ease of enforcement rather than sound scientific or veterinary judgment.

We believe a better approach would to keep the current standard but modify the language to require that dogs be adequately hydrated and have increased access to water depending on exacerbating conditions. In cases of illness, injury or pregnancy there should be veterinary intervention and the decision on additional access to water should be left to the attending veterinarian. We are confident that APHIS could devise a regulation that did not require continuous access for all, while providing adequate water access for those with special needs.

## ***De minimis* Requirement for Exception from Licensing and Definition of Breeding Female**

Our final issue is the failure to define breeding female related to the *de minimis* exception from licensing. A facility may qualify for exceptions from licensing if it has four or fewer breeding females. However, the term is not defined in regulation, but the APHIS Fact Sheet states that any dog, cat or wildlife/exotic pocket pets capable of reproduction count toward the total of four or fewer breeding females needed for exclusion. The Manager’s Report on the 2014 Farm Bill requested clarification that “only those female animals capable of reproduction and actively being used in a breeding program” meet the definition of breeding female. APHIS has not done so, even though many small and hobby breeders maintain more than four females capable of breeding, but do not breed each one for a variety of animal welfare concerns.

Several reliable scientific longitudinal studies have shown that intact females or those spayed late in life have statistically significant longer lives than those spayed earlier in life. Breeders may not breed a female

able to breed in order to evaluate them for show or performance events and to permit them to demonstrate fully the capability to succeed in their activities before deciding whether they are worthy of breeding. Breeders also may not breed every female capable of breeding because of lifestyle influence or other related commitments.

We are aware that APHIS does not have the authority to require recordkeeping of those not subject to licensing under the Act. However, it does have the authority to require those claiming an exemption from the statutory or regulatory requirements to demonstrate that the exception applies. The current definition is easy to administer, but APHIS already permits documentation that an intact female does not qualify as a breeding female under the regulatory exception. For example, a veterinarian may certify that an intact female is too young to breed, has a health condition that precludes breeding or is too old to breed successfully. If APHIS were to provide a suitable and reliable recordkeeping standard, whether by the licensee, a veterinarian or some other entity, it could better account for the actual breeding history of each female. This would permit APHIS to provide suitable exclusions for animals that are not actually bred within some defined period of time,

The present *de minimis* standard of four or fewer also does not bear a rational relationship to the number of animals produced or the burden of care for their welfare. Considering only two species, dogs and cats, the number able to be produced annually varies greatly since dogs typically have only two cycles per year, while cats are seasonally polyestrous and can have many more cycles per year depending on geography, temperature and the number of daylight hours. In addition, cats become less fertile as they get older, but never lose total fertility.

Even within a single species, there may be great variation in the number of offspring produced with each breeding. For example, the average size of a litter of dogs can range from one to more than fifteen. APHIS' own licensing standards are based on the number of animals cared for. The proposed regulations require APHIS to inspect the facility with one goal being to ensure that the facility can provide adequate care for the animals housed therein. It would require new licensing when the number of animals increases above the threshold approved for the original license. Therefore, we believe that the better approach would be to tie the *de minimis* exemption to the number of animals produced, with an alternative tied to the number of breeding females at the location. This logic applies to all species subject to the *de minimis* exception.

Many states base their kennel licensing on numbers of animals housed or the number of offspring produced. For example, Pennsylvania defines a commercial kennel as one which "breeds or whelps dogs and: (1) sells or transfers any dog to a dealer or pet shop kennel; or (2) sells or transfers more than 60 dogs per calendar year." APHIS could define a similar number of dogs produced, not sold, as meeting the *de minimis* standard. This would better tie the standard to the ability of the facility to care for the dogs housed there than the mere number of breeding females present at the facility.

This also would require APHIS to define a suitable recordkeeping standard to establish the number of breedings producing offspring for those documenting that they are below the *de minimis* threshold. This form could be filled out under penalty of perjury. If a registry had a program that required all animals produced to be registered and provided standards for health testing, responsibility for animals they produce and education of buyers, they might be willing to provide the breeder with certified copies of their registration records.

We are aware of programs which meet those requirements, but do not have a commitment for participation in providing certified information to breeders. While we do not have any commitment to use this as a standard, the details of two programs that might be of interest may be found at <https://www.akc.org/breeder-programs/akc-breeder-of-merit-program/> and <https://www.akc.org/breeder-programs/akc-bred-with-heart-program/benefits/>.

It will take thoughtful and careful design to develop these standards but would better reflect the reduced risk to the animals from those engaged in *de minimis* activities. We ask that APHIS evaluate this alternative as a way to define *de minimis* activities in relation to the reduced risk based on the number of animals at a location.

Thank you for the opportunity to comment on the important issues covered in Docket No. APHIS-2017-0062. We stand ready to be of help if we can offer any further input, suggestions or clarification.

Sincerely,

A handwritten signature in blue ink that reads "Patti Strand". The signature is written in a cursive, flowing style.

Patti Strand, President, National Animal Interest Alliance